IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.151 OF 1991

Shri.Manohar Gajanan Koshe
Age - 44 yrs., Occupation - Wireman,
r/o. Khopoli, Tal. Khalapur,
District Raigad. .. Petitioner

Vs.

Shri.Sadashiv Mahadeo Pardeshi
since deceased by his legal heir
Shri.Nandkumar Sadashiv Pardeshi
Age - 40 years, Occupation - Nil,
r/o. Khopoli, Tal. Khalapur,
Dist. Raigad. .. Respondent

Mr.A.K.Abhyankar for the Petitioner.
Mr.A.S.Khandeparkar with Ms.Shilpa Joshi for the Respondent.

CORAM : DR.S.RADHAKRISHNAN,J.

DATE : 18TH AUGUST, 2006.

(ORAL JUDGMENT :-)

1. By this Petition, the Petitioner-Tenant is challenging the Judgment and Order of the Learned Civil Judge, Junior Division, Khalapur, District Raigad dated 28th September, 1984 and also the Judgment and Order of the Learned Additional District Judge, Raigad dated 24th October, 1990, confirming the Judgment of the Trial Court, in an Appeal. The Petitioner-Tenant, aggrieved by both the aforesaid Judgments, has filed this Petition under Article 227 of the Constitution of India.

2. The brief facts are, that the Petitioner was inducted as a Tenant in a suit premises which includes a room and a tin shed. In the said room, two walls were of tin sheets. The area of the tin shed was 9’ X 9" and the area of the room was 14’ X 14’. The monthly rent of the suit premises was of Rs.3/-.

3. It appears that the Petitioner-Tenant had approached the Respondent-Landlord to carry out certain repairs in the said suit premises and ultimately, the Petitioner-Tenant informed the Landlord that he was carrying out the repairs at his own costs. The Landlord appears to have made an application on 16th May, 1980 to the Khopoli Municipal Council, mentioning therein that the Petitioner-Tenant may be allowed to repair two tin sheets in the said suit premises by removing them and providing a wall. However, the Khopoli Municipal Council had declined to grant any permission for carrying out such repairs vide Exhibit 68. The Petitioner-Tenant appears to have on his own, got the entire premises demolished and got a new construction erected consisting of bricks and masonary and even a new plinth was laid. It is also the contention of the Landlord that even the floor area of the said premises has been increased. Over and above, a separate bath room has

also been constructed in the nearby open space. Under the aforesaid facts and circumstances, the landlord terminated the tenancy of the Petitioner and filed a suit for eviction, mainly on the ground of section 13(1)(b) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as the Rent Act). Section 13(1)(b) reads as under :-

> 13(1) "Notwithstanding anything contained in this Act [but subject to [the provisions of section 15 and 15A]], a Landlord shall be entitled to recover possession of any premises if the Court is satisfied.....
>
> 13(1)(a) that the tenant as committed any act contrary to the provision of clause (a) of section 108 of the Transfer of Property Act, 1882; or.....
>
> 13(1)(b) that the tenant has, without the landlord's consent given in writing, erected on the premises any permanent structure,
>
> [Explanation - For the purposes of this clause, the expression "permanent structure" does not include the carrying out of any work with the permission, wherever necessary, of the local authority, for providing a wooden partition, standing cooking platform in kitchen, door, lattice work or opening of a window necessary for ventilation a false ceiling, installation of air-conditioner, an exhaust outlet or a smoke chimney; or]

4. Both the parties had led their evidence. On behalf of the Landlord, the Landlord has examined himself and he had also examined the Surveyor and the Civil Mason, who had carried out the construction of the said room and the bath room. The Petitioner-Tenant had examined himself alone. On a perusal of the evidence,

the Trial Court Judgment as well as the Lower Appellate Court Judgment, the basic issue arises as to whether the Respondent-Landlord has established that the Petitioner-Tenant had carried out certain permanent construction on the suit premises without the Landlord's consent in writing. The Landlord has categorically stated in his evidence that the Landlord had only applied for permission to carry out certain repairs to enable the Tenant to carry out the same, subject to Khopoli Municipal Council granting such a permission. However, from the evidence, it is clear that the Khopoli Municipal Council had declined to grant any such permission to carry out the repairs. On the contrary, from the evidence, it is seen that the Petitioner-Tenant had totally demolished the entire structure and constructed a new construction with a new plinth and a new additional bath room in the open space nearby. In this behalf, the Petitioner-Tenant himself admits in paragraph No.6 of his evidence that he had increased the height of the suit premises by 1' or 2' and the sink therein was completely removed by him. In paragraph No.8 of his evidence, the Petitioner states very clearly that all the walls of the room are newly constructed in place of the old walls. He also admits that the entire roof of the tenement was changed by him. Whereas the original roof was made out by tin and wooden rafters and the new roof is completely made by cement sheets. In paragraph No.9 of the Petitioner's evidence, he also

admits that he had not obtained any permission from the Municipal Council for the construction of the said structure and he also admits that he had not demanded any consent in writing from the Plaintiff or his deceased father. From the above evidence, it is very clear that the suit structure has been completely demolished and constructed new structure with a new plinth and the Petitioner-Tenant had also constructed a new bath room near the suit structure.

5. Mr.Abhyankar, the learned Counsel for the Petitioner strongly relied on Exhibit-46, which is the letter written by the Landlord to Khopoli Municipal Council seeking permission to carry out certain repairs by the Tenant. Mr.Abhyankar contends that the aforesaid letter amounts to written consent by the Landlord. The learned Counsel therefore submitted that the findings given by both the Lower Courts are totally erroneous and the order of eviction ought not to have been passed. It may be noted here that in the written statement, the Petitioner-Tenant has taken a stand that the Landlord had granted oral permission to construct the said suit structure. However, during the arguments, his stand taken was that the aforesaid application of the Landlord to Khopoli Municipal Council should be treated as a written permission of the Landlord to allow the Petitioner to construct the suit structure. Therefore, the main submission of Mr.Abhyankar is that the

Petitioner has not committed any breach of the provisions of the Section 13(1)(b) of the Rent Act, so as to enable the Lower Courts to grant a decree of eviction against him.

6. Mr.Abhyankar, the learned Counsel has relied on a judgment of our High Court in **Pitambardas Kalyanji Bakotiya Vs. Dattaji Krishnaji, 1981 Mh.L.J.291**. Specially, the following observations made in the said judgment :-

> "In my judgment, the question as to whether a particular construction is a permanent structure must be decided with reference to the nature and the situs of the structure, the mode of annexation, the intention of the tenant and all the surrounding circumstances. The test of removability is not the conclusive test. If these structure can be removed without doing irreparable damage to the demises premises, then that would be certainly one of the circumstances to be considered for deciding the question of intention. If the object and purpose of annexation was only to better or more complete enjoyment of the demised premises, such a structure cannot be treated as a permanent structure. It is also necessary to consider in this connection whether the structure brings about a substantial change in the character of the demised premises."

7. Thereafter, Mr.Abhyankar relied on an another judgment of our High Court in **Somnath Krishnaji Gangal Vs. Moreshwar Krishnaji Kale and Others, 1995(1) Mh.L.J. 675**, specially on paragraph 21, which reads as under :-

> "21. In view of the decisions of the Hon’ble

Supreme Court and of this Court, my conclusions are as under :

i) In deciding the question as to what is a "permanent structure", it is necessary to consider the mode and degree of annexation as also the intention of the party putting up the structure. The creation of such a work or addition thereof in order to amount to a permanent structure must cause and bring about a substantial improvement and change in the nature and form of accommodation.

ii) If what has been done is by way of minor repairs for the better enjoyment and use of the premises, it cannot be regarded as a permanent structure. Similarly, if the object and purpose of annexation was only to better the mode of enjoyment of the demised premises as in the case of construction of the kitchen platform, it does not amount to a permanent structure within the meaning of section 13(1)(b) of the said Rent Act.

iii) The essential element which needs consideration is as to whether the construction is substantial in nature and whether it alters the form, front and structure of the accommodation.

iv) If what the tenant does is large scale renovation like replacement of the entire roof, covering it with marble tiles, without obtaining permission of the Landlord, it may amount to permanent structure within the meaning of section 13(1)(b) of the Rent Act.

v) Similarly, if the tenant constructs a bathroom in the gallery which puts additional burden in the gallery which is harmful to the structure of the building, it would amount to a permanent structure.

8. Mr.Abhyankar, the learned Counsel for the Petitioner-Tenant also relied on the Judgment of the Hon’ble Supreme Court in **Om Prakash Vs. Amar Singh and Others, (1987)1 SCC 458**, specially on paragraph No.7,

which reads as under :-

> "7. In the instant case the disputed constructions which the High Court has found to be 'material alteration' consists of a partition wall of 6 feet height in a hall converting the same into two rooms and a tin shed marked by letter CDGH on the eastern side on an open land adjacent to the accommodation. The Trial Court held that the partition wall did not change the front or structure of the accommodation, it being temporary in nature, did not constitute material alterations in the accommodation. This finding of the Trial Court was not challenged by the Landlord before the Civil Judge. But the High Court has held that the partition wall constituted 'material alteration'. The findings recorded by the Trial Court and the relevant evidence placed before us by the parties clearly show that the partition wall did not actually partition the hall converting the same permanently into two rooms. The partition wall was made without digging any foundation of the floor of the room nor it touched the ceiling, instead; it was a temporary wall of 6 feet height converting the big hall into two portions for its convenient use, it could be removed at any time without causing any damage to the building. The partition wall did not make any structural change of substantial character either in the form or structure of the accommodation."

9. Mr.Abhyankar, therefore, in the light of the evidence as well as the aforesaid judgments, strongly contended that both the Trial Court as well as the Lower Appellate Court have committed an apparent error on the face of the record inasmuch as the said application of the Respondent-Landlord to the Municipal Council ought to have been construed as a written permission. Hence, the learned Counsel has submitted that both the Lower Courts ought not to have granted a decree of eviction.

10. Mr.Khandeparkar, the learned Counsel appearing on behalf of the Respondent-Landlord strongly pointed out that the aforesaid application of the Landlord to the Municipal Council made it abundantly clear that the permission which sought was only to carry out "repairs" and that too with the permission of the Khopoli Municipal Council. Mr.Khandeparkar emphasised that admittedly, in this case, the Khopoli Municipal Council had declined to grant any such permission and as such the Petitioner-Tenant could not have even carried out even the repairs. Whereas what was constructed were permanent structures, as pointed out hereinabove. Therefore, Mr.Khandeparkar pointed out that both the Lower Courts have correctly given concurrent findings that erecting a totally new structure in place of old one and also constructing an additional bath room would clearly show that the Petitioner-Tenant had committed a clear breach under section 13(1)(b) of the Rent Act.

11. Mr.Khandeparkar, the learned Counsel appearing on behalf of the Respondent-Landlord has relied on the very same judgment cited by the Petitioner-Tenant in the said case i.e. **Pitambardas Kalyanji Bakotia Vs. Dattaji Krishnaji** and pointed out that in the said case, the Court had held that even if there may be a permanent structure, which can be easily removed and would not cause damage to the main structure, such as a kitchen platform, in such case, the structure would be

permissible. Whereas, in the instant case, Mr.Khandeparkar pointed out that the entire suit structure is demolished and a totally new concrete structure is erected with a new plinth and the Respondent-Landlord did not give any permission in writing to erect any permanent structure. The application made to the Khapoli Municipal Council was only to grant a permission to carry out certain repairs and not to construct permanent structures.

12. Mr.Khandeparkar also relied on the judgment of this High Court in the case of **Shridhar Govind Natu Vs. Ankush Krishnaji Sawant, AIR 1985 Bombay 267**, wherein it is clearly held that the erection of a bathroom adjacent to the premises let out to the Tenant amounts to a permanent structure under section 13(1)(b) of the Rent Act. The learned Counsel for the Respondent also relied on the judgment of this Court in the case of **Abdul Gafoor Kamaluddin deceased by legal heirs Vs. Haji Saheb Mslangasaheb Paga deceased by legal representatives, 1984 Bom.R.C.120**, wherein this Court has taken a view that the increasing the height of wall by 2’ would amount to a permanent structure, liable for a decree of eviction

13. The learned Counsel for the Respondent also relied on the judgment in the case of **Vimalabai w/o. Jaynt Pawar Vs. Laxmibai w/o. Jaywantrao Nandrekar,**

1984 Bom.R.C. 363, wherein this Court had clearly held that the erection of roof amounts to a permanent structure. Finally, Mr.Khandeparkar has relied on the judgment of the Hon'ble Supreme Court in the case of **Manmohan Das Shah Vs. Bishun Das, 1967 AIR (SC) 643**, wherein the Hon'ble Supreme Court, in clear terms has held that even all the alterations did not cause any damage to the premises or did not substantially diminish their value, but the alterations were material alterations and on that basis alone the Appellants were entitled to evict the Respondent. In fact, in the said case before the Hon'ble Supreme Court, it was sought to be contended that the alterations made would be beneficial to the Landlord.

14. In view of all the aforesaid facts and circumstances, Mr.Khandeparkar submitted that both the Trial Court and Lower Appellate Court had rightly held that the structures constructed by the Petitioner-Tenant were of a permanent nature and that too without any permission in writing from the Respondent-Landord, as such Decree of eviction was passed against the Petitioner. Mr.Khandeparkar, therefore, submitted that there is no error apparent on the face of the record.

15. Having heard both the learned Counsel at length and after perusal of the evidence and the records and both the Trial Court Judgement as well as the Lower

Appellate Court Judgment, it is abundantly clear that the Petitioner had in fact, demolished the entire structure and got a new concrete structure erected there with a new plinth and also had constructed an additional new bathroom in the open space nearby. The reliance placed on the application of the Respondent-Landlord submitted to the Khopoli Municipal Council will be no assistance to the Petitioner-Tenant, since it was only an application to permit the Petitioner-Tenant to carry out certain "repairs" which permission was also declined by the Khopoli Municipal Council.

16. In the light of the above, the said application of the Landlord can never be construed as a written permission to construct a permanent structure, as contemplated in section 13(1)(b) of the Rent Act.

17. The Judgment of this Court in **Pitambardas Case,** makes it abundantly clear that if any additional permanent structure is provided in the suit premises and if the said structure were to be removed, no irreparable damage should be caused to the demised premises possibly then one can construe that it is not a permanent structure, as contemplated in section 13(1)(b) of the Rent Act. On the contrary, the Petitioner-Tenant, in the instant case without any written permission of the Respondent-Landlord as well as the Khopoli Municipal Council, had got the entire suit premises demolished and erected a new concrete structure with a new plinth and

also an additional bath room. In the light of the above and the judgments referred to in this case, I do not find any error apparent on the face of the record so as to interfere by exercising the jurisdiction under Article 227 of the Constitution of India. Hence, Rule stands discharged.

18. The learned Counsel for the Petitioner-Tenant prays for stay of this order for a period of eight weeks. This order shall stand stayed for a period of eight weeks.

(DR.S.RADHAKRISHNAN,J.)